IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

L.Rs. of Talsa Ram vs. Mohammed Ali & ors.

S.B. Civil Second Appeal No. 141/1989 against the judgment and decree dated 25.11.1989 passed by the learned District & Sessions Judge, Sirohi in Civil Appeal No.122/84.

Date of Judgment: April 04, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. J.L. Purohit for the appellants.
Mr. Aklesh Agrawal for the respondents.

BY THE COURT:

REPORTABLE

This second appeal is against the judgment and decree passed by the first appellate court dated 25.11.1989 passed in Civil Appeal Decree No.122/84 by which the first appellate court upheld the eviction decree dated 27.11.1984 passed by the court of Civil Judge,Sirohi inCivil Original Suit No.5/82.

Brief facts of the case are that the plaintiffs descendants of original landlord filed the suit for eviction of the defendant Talsa Ram in the trial court on 6.3.1976. The ground for eviction submitted by the plaintiffs are that the defendant committed default in payment of rent, the suit premises is required for personal bonafide necessity of the plaintiffs for running a flour-mill in the suit premises as the plaintiffs

have no other accommodation in the town Sheoganj for this purpose. The defendant contested the suit. In the trial court issues were framed on 18.2.1977 and thereafter on 13.12.1982, additional issue was framed with respect to the plea whether the decree for part of the suit premises can satisfy the need of the plaintiffs. The evidence was recorded and thereafter the trial court held that the defendant committed default in payment of rent and also decided issue of personal bonafide necessity in favour of the plaintiffs. The trial court also decided the issue of partial eviction and observed that both the parties have clearly admitted that by eviction of tenant from part of premises will not satisfy the requirement of any party. Consequently, the eviction decree for whole of the rented premises was passed by the trial court on 27.9.1984. The tenant preferred regular first appeal to challenge the finding of the trial court recorded on the issue of default as well as the finding recorded on the question of personal bonafide necessity of the plaintiffs for the suit premises. The first appellate court partly allowed the appeal of the defendant-tenant and held that the defendant-tenant has not committed default in payment of rent, however, the first appellate court upheld the finding of the trial court on the question of personal bonafide necessity of the plaintiffs for the suit premises. Hence against the judgment and decree of the first appellate court dated 25.11.1989, this second appeal has been preferred. Following substantial

questions of law were framed by this Court while admitting this second appeal on 23.11.1992:-

> "1. Whether in the circumstances the finding of the Lower Court about their bonafide necessity is clearly vitiated on account of non-consideration of the most important facts and evidence ?
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> 2. Whether the non-consideration of the fact whether partial eviction will meet the bonafide requirement of the land lord vitiates the decree ?

The learned counsel for the appellants vehemently submitted that the findings of both the courts below on the question of personal bonafide necessity of the plaintiffs for the suit premises is vitiated because of drawing wrong inference from the facts and evidence available on record. It is also submitted that the two courts below misread the evidence and, therefore, wrongly held that the plaintiffs proved their need. The learned counsel for the appellants pointed out that in the plaint, the plaintiff pleaded that the suit premises is required for establishing business by running flour-mill and this requirement was shown for three brothers, namely Mohammed Ali, Mujaffar Ali and Turao Ali, whereas in evidence, it has come from the statement of the plaintiff Mohammed Ali that all the three brothers are having separate and independent businesses. Those businesses of the three plaintiffs, has no connection with the flour-mill business. Not only this but the plaintiff himself admitted that he was not residing in the

town Sheoganj and he was residing in Jalore. In view of above, the three brothers are separate and living at least one of the brothers not in the town and there is no reason for their being jointly running the flour-mill business. The learned counsel for the appellant read over the statements of the plaintiff-Mohammed Ali (PW-1) as well as the witnesses produced by the plaintiff to show that from the evidence produced by the plaintiff, need of the plaintiff is not proved. The learned counsel for the appellant vehemently submitted that it is settled law that mere wish of the plaintiff itself is not sufficient. There is no presumption in favour of the plaintiff of his bona fide in case he seeks eviction of tenant on the ground of personal bona fide need and, therefore, the plaintiff is required to prove his need as well as bona fide. It is submitted that the ground taken by the plaintiffs is absolutely illusory, unimaginable and unbelievable.

The learned counsel for the appellants also submitted that it is mandatory duty of the court to decide the question of comparative hardship as that duty has been put upon the court by the statutory provisions of law by enacting Section 14(2) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950. P*ari* materia provision was there in the Act which was in force in the State of Jammu and Kashmir. A case arising under the Act of Jammu and Kashmir in relation to the issue of partial eviction, the matter was taken up to the Hon'ble Apex

Court in the case of Rahman Jeo Wangnoo v. Ram Chand and others (AIR 1978 SC 413). Hon'ble the Apex Court clearly laid down that even if there is no pleading and issue even then the court is required to decide the question of partial eviction and to find out whether the need of the plaintiff can be satisfied by passing the decree for part of the premises only. The learned counsel for the appellant also relied upon the judgment of this Court delivered in the case of L.Rs. ff Ibrahim and others vs. L.Rs. Of Fakruddin & ors. (RLW 1997(2) Raj. 768) and Badrinarayan Chunilal Bhutada v. Govindram Ramgopal Mundada ((2003) 2 SCC 320).

The learned counsel for the appellants further submitted that the landlords failed to plead and prove that they have any experience of running the flour-mill and, therefore, looking to the other facts and circumstances of the case, the ground raised for eviction of the tenant by the plaintiff is nothing but an illusory ground. The learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court respondent delivered in the case of Mattulal v. Radhe Lal (AIR 1974 SC 1596) and Heera Lal v.V. Mandir Shri Thakurji Sangria & anr. (2005 CJ (Rent Control) 283).

The learned counsel for the respondents submitted that the appellants cannot challenge the finding of the trial court recorded on the issue of partial eviction because of the two reasons which goes to

the root of the matter. One is that this is case of the plaintiffs and defendant both in their evidence that the need of the parties cannot be satisfied by part of the premises, therefore, any argument of the appellant-tenant challenging the finding of the trial court on question of partial eviction is contrary to the admission of the defendant himself. Secondly, the defendant-tenant did not challenge the finding of the trial court before the first appellate court and thereby accepted the said finding which is based upon the admission of the defendant. It is also submitted that the question which has not been raised before the lower court, cannot be raised before the appellate court.

The learned counsel for the respondent also submitted that even in a case where there was no pleading and there was no issue on the question of partial eviction, even then if the court has recorded finding then it is not necessary and desirable to set aside the finding of the court below which was recorded after affording opportunity of hearing to both the parties in the civil suit. The learned counsel for the respondents relied upon the judgment of this Court delivered in the case of Bhanwar Lal v. Tikam Chand & ors. (2000(4) WLC(Raj.) 408) and another judgment of this Court delivered in the case of Anandi Lal vs.Smt.Sarju Devi & ors. (2004(4) WLC (Raj.) 547),

The learned counsel for the respondents submitted that in fact the question of personal bonafide necessity of the plaintiff is a pure

question of fact and the two courts below have considered all evidence on record and thereafter decide the question of fact in favour of the landlord. Therefore, this Court may not exercise its jurisdiction to interfere the finding of fact recorded by the two courts below recorded concurrently. It is also submitted that the finding of fact is based on evidence and in fact the appellants' contentions are on the basis of misreading of the evidence and bereft of the case because the defendant himself in his written statement, has not taken a plea that the plaintiffs are not residing in the town or they are not doing the business. The defendant also not pleaded that the plaintiff cannot do the business of flour-mill. The defendant also not pleaded that the plaintiff cannot do the business of flour-mill because of the lack of experience or otherwise. The learned counsel for the respondent relied upon the judgment of the Hon'ble Apex Court in the case of Dattatraya Laxman Kamble v. Abdul Rasul Moulali Kotkune & anr. (All India Rent Control Journal 1999 Vol. 2 page 1) and also relied upon the judgment of the Hon'ble Supreme Court delivered in the case of Raghunath G. Panhale(Dead) by LRs. v. Chaganlal Sundarji and Co. ((1999) 8 SCC 1, wherein it has been held that the landlord need not to have actually lost his existing job, nor resigned it, nor reached a level of starvation to justify getting possession of the suit premises in order to establish a business.

I considered the submissions of the learned counsel for the parties and perused the record also.

Much has been argued on behalf of the appellants, the legal representatives of the original tenant to challenge the finding of the trial court on the question of personal bonafide necessity but all arguments have been advanced ignoring the defence taken by the defendant against the facts pleaded by the plaintiffs. The plaintiffs pleaded that they want to start business of running flour-mill. In reply to it, the defendants stated that they are doing the business of grocery. In the entire written statement, the defendants nowhere stated that the plaintiffs or three of the plaintiffs or for whose need the suit has been filed, are not residing in the town Sheoganj. Not only this, in evidence also when suggestion was given to one of the plaintiffs who alone appeared as witnesses, that he is residing at Jalore, he clearly stated that for one year, that is in the year 1971 to 1972, he was at Jalore. Other witnesses of the plaintiff denied the suggestion of the plaintiff in cross-examination about the plaintiff's living at other place. Therefore, without there being any pleading of the defendant to the effect that plaintiffs are not residing in the town,the defendant was permitted to put question on this fact but the plaintiff denied the fact. The learned counsel for the appellants also tried to read from the statement of the plaintiff to show that the plaintiff got one of the shop vacated and that

shop is lying in the possession of the plaintiffs. At this juncture it will be worthwhile to mention here that suit for eviction of the tenant was filed by the landlord in the year 1976.The statement of plaintiff was recored on 19.8.1981. In cross-examination, the plaintiff in reply to the question about the total accommodation in plaintiff's possession, which according to the plaintiff were four rooms, the plaintiff stated that there was one shop with tenant Raghunath and that was got vacated by the plaintiffs and he further stated that in that shop the plaintiff 's family is residing. For the reasons best known to the defendant, he did not put this fact in the written statement if the said shop was got vacated by the plaintiff before the suit was filed. If that shop was got vacated during pendency of the suit even then till 1981 the defendant did not choose to amend the written statement nor submitted any application under Order 7 Rule 7, C.P.C. for taking on record this subsequent event. Be it as it may be, the plaintiff was not cross-examined when that alleged shop which was in possession of tenant Raghunath was got vacated by the landlord and for what reason. There is no reason to disbelieve that in a family of so many family members, if any shop or room was got vacated by the plaintiff from their tenants and the plaintiff says it is for use of residence, then that statement is improbable and unbelievable.

So far as other businesses of the all three persons for whose need the suit for eviction against the tenant was filed is concerned, that is

very relevant. The plea which has been raised before this Court is also not based on the facts of the case. As stated above in the preceding paras, the plaintiffs submitted that they want to do the business of flour-mill in the suit premises. In reply to which the defendant stated that the plaintiffs, obviously three persons are doing the business of grocery. The defendant cannot resile from his such statement which impliedly means that the defendant admitted that the plaintiffs are residing in the town Sheoganj where the suit property is situated. Otherwise also, there is no pleading of the defendant that the plaintiffs are not residing in the town. Apart from it, there is no evidence to prove this fact that they are not residing in the town. Their business of grocery is separate and independent for each of the plaintiffs or the each of the plaintiff for whose need the suit was filed is not the case pleaded by the defendant. It appears that the plaintiff was cross-examined on these questions but it will be worthwhile to mention here that the cross-examination is with respect to the different business of the plaintiffs but without further getting evidence on record from the mouth of the plaintiffs that they are having different business since before filing of the suit and obvious reason is that that question was not put to the plaintiffs because of the reason that that was not the case of the defendant in the written statement. Therefore, if during pendency of the suit, the defendants started their other business then they are

not supposed to remain ideal till the plaintiffs get the possession of the suit property. This view fully supported by the judgment of the Apex Court delivered in the case of Dattatraya Laxman Kamble's case (supra). The Hon'ble Supreme Court in the said case also clearly held that that if a person wants to start new business on his own it may be to his own advantage if he acquires experience in that line. But to say that any venture of a person in the business field without acquiring past experience reflects lack of his bona fides is a fallacious and unpragmatic approach. Many a business have flourished in this country by leaps and bounds which were started by novice in the field; any many other business ventures have gone haywire despite vast experience to the credit of the propounders. That acquisition of sufficient know-how is a precondition for even proposing to start any business, if gains approval as a proposition of law, is likely to shatter the initiative of young talents and deter new enterpreneurs from entering any field of business of commercial activity. Experience can be earned even while the business is in progress. It is too pedantic a norm to be formulated that “no experience no venture”.

The Hon'ble Supreme Court in the case of Mattu Lal (supra) clearly held that it is difficult to imagine how the respondent could be expected to make preparations for starting the new business unless there was a reasonable prospect of his being able to obtain possession of shop in the the near future. The Hon'ble Supreme Court at this place noticed the present set of situation

in relation to the judicial proceedings and observed that it is common but unfortunate failing of our judicial system that a litigation takes an inordinately long time in reaching a final conclusion and then also it is uncertain as to how it will end and with what result and unless the respondent could be reasonably sure that he would within a short time be able to obtain possession of the shop and start a new business, it would be too much to expect from him that he should make preparations for starting the new business. The preparation for starting of new business not only dependent upon the fact when the landlord will get the possession of the rented premises for running his business but also depends upon the nature of business because of the reason that several businesses need no experience .

At this juncture it will be worthwhile to mention here that the plaintiffs are resident of small town Sheoganj in the District Sirohi in the State of Rajasthan and they want to do the flour-mill business and for which a ground has been raised that they should have experience of even running flour-mill. This is too much if such a plea is accepted and it is held that even for running a flour-mill, experience is required. Looking to the nature of the work, the three plaintiffs which they are doing, it appears that they are doing their very small work to earn the bread. The plaintiff stated that he has money of Rs.5000/- which he could invest for running the flour-mill.

At this juncture, it will be further worthwhile to mention here that two courts below also held that the defendant has other accommodation available with him. The appeal could have been dismissed on the ground that the question decided by the two courts below is pure question of fact and is based on evidence but in view of the arguments raised by the learned counsel for the appellants, the issue of personal bonafide necessity was again examined by this Court and this Court is of the view that two courts below were right in holding that the suit premises is required for the personal bonafide need of the plaintiffs for running their flour-mill.

The learned counsel for the appellants submitted that even if the tenant has admitted in his statement that his need cannot be satisfied by part of the premises still it was the duty of the court to apply its mend and the court should have rejected that statement of the defendant. It is also submitted that even if the defendant has not challenged the finding of the trial court on the issue of partial eviction even then it was duty of the appellate court to apply its mind and decide the question of partial eviction. Not only this, according to the learned counsel for the appellant, the appellants can challenge the finding of the trial court straight way in second appeal without challenging it before the first appellate court because of the reason that it is the statutory duty casts upon the court to determine the issue. The

learned counsel for the appellants, as stated above, relied upon the judgment of the Hon'ble Supreme Court in the case of Rahman Jeo Wangnoo's case (supra).

The Hon'ble Supreme Court in the case of Rahman Jeo Wangnoo (supra), only held that whether the courts could have refused to decide the question of partial eviction for want of pleading and issue. The Apex Court held that the proviso to Section 11(h) of the Jammu and Kashmir Houses and Shops Rent Control Act,1966, pari materia to Section 14(2) of the Act of 1950, mandates the court to consider whether eviction of tenant from part of the premises is to be ordered so as to substantially satisfied the requirement of landlord. The judgment of the Apex Court has been stressed too much by saying that in a case where there is issue framed by the court and evidence led by the parties and both the parties admitted that need of the parties cannot be satisfied by dividing the premises and giving one portion to the plaintiff and another portion to the defendant, still the court can grant decree in favour of the land lord for part of the premises. It appears that the said argument has been advanced on the basis of presumption that the court possesses some super power to decide the question of fact according to court's own measurement. The plaintiff's contention that full suit premises is required for his business. The defendant himself says that he cannot run his business if any of the portions of the premises is given to the

landlord, then in that situation, the requirement of the plaintiff may be of some lesser area but the tenant cannot ask for decree to the extent of area needed by the plaintiff so as to keep the possession of rest of the premises with him where according to tenant himself he cannot use the premises for the purpose for which he took the premises on rent. It is true that the defendant could have stated that the need of the plaintiff can be satisfied from some of the portions of the rented premises and the said plea of the defendant may have been accepted by the court on the basis of the appreciation of evidence but so far as need of the defendant is concerned, he alone was the best judge and when the defendant says that his no purpose can be served by part of the rented premises then in that situation, the plea of the defendant is at the risk of the defendant and in that situation the only decree which can be passed is the decree for whole of the premises against the tenant irrespective of fact that the whole of the premises may be in excess to need of the plaintiff landlord. The other reason is that the two stands of the defendants cannot remain, one is that he cannot run the business in the premises if he is asked to vacate some portion of the premises and another, still he is entitled to retain part of the rented premises. At this place we should not ignore the fact that the landlord is owner of the property and is entitled to claim possession from the tenant only when he proves the case for eviction of the tenant under

the provisions of relevant law and which normally puts several restrictions upon the landlord then there cannot be more restriction upon the rights of the landlord/owner of property than imposed by the State Rent Act. When the landlord proves the case for eviction of the tenant, on the ground of his personal reasonable and bonafide necessity for the premises still he is required to prove the need of the entire suit premises. This gives advantage to the defendant-tenant who can retain possession of the part of the rented premises by bifurcating the tenancy. That does not mean that that gives right to the tenant to keep the premises for himself for no purpose and for no purpose for which he took the premises on rent. This will be virtually affecting the property right of the landlord.

The tenant had opportunity to contest the issue of partial eviction, got the decision which he wished in the trial court and felt satisfied by the decision of the trial court, did not challenge the question of fact before the first appellate court and, therefore, could not have challenged the finding of the trial court straight way in the second appeal. Therefore, virtually by this plea, the defendant wants now to reopen the entire case, which was filed in the year 1976 and which was accepted by the defendant himself on the question of partial eviction, on hypertechnical ground raised on the basis of a few judgments referred above which have no application to the facts of the

present case.

In view of above discussion, substantial questions of law no.1 and 2 are decided against the appellants and it is held that the finding of the courts below on the issue of personal bonafide necessity of the plaintiff is not vitiated on account of non-consideration of any fact or evidence and it is further held that the appellants could not have raised a ground of partial eviction in the facts of the present case and in the facts of the present case, the decree for partial eviction cannot be passed.

Hence the appeal of the appellants is dismissed.

(PRAKASH TATIA),J.

mlt.